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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA,
Petitioner,

VS.

MARY BRUG,
Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the conduct of the Pension Plan of the Carpenters Pension Trust Fund for Northern California in denying a pension to Plaintiff Mary Brug was arbitrary, capricious, made in bad faith, not supported by substantial evidence or erroneous on a question of law.

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Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

Pension Plan of the Carpenters Pension Trust Fund for Northern California respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 12, 1982.

I

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 669 F.2d 570. That Court's order denying Petitioner's petition for rehearing and rejecting Petitioner's suggestion for a rehearing *en banc* (Appendix C, *infra*) was filed on April 16, 1982. The order and judgment of the United States District Court for the Northern District of California (Appendix B, *infra*) was entered on June 9, 1980, and is not reported.

II

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on February 12, 1982. A timely petition for rehearing and suggestion for a rehearing *en banc* was filed on February 26, 1982. On April 16, 1982, the petition for rehearing was denied and the suggestion for a rehearing *en banc* was rejected. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c).

III

STATUTORY PROVISIONS

The relevant statutory provisions are:

1. Employee Retirement Income Security Act, Section 404, 29 U.S.C. § 1104;
2. Labor Management Relations Act of 1947, Section 302, 29 U.S.C. Section 186.

Pertinent portions of these statutory provisions are reproduced at Appendix D, *infra*.

IV

STATEMENT OF THE CASE

Mary Brug (hereinafter "Brug") filed this action on December 1, 1976, naming the Pension Plan of the Carpenters Pension Trust Fund for Northern California (hereinafter "Pension Plan"), the Trustees of the Carpenters Pension Trust Fund for Northern California (hereinafter "Trustees") and Carpenters Local Union No. 22 (hereinafter "Local 22") as defendants. In her complaint, Brug alleged that by denying her application for a pension, the Trustees and the Pension Plan violated the governing instruments of the Pension Plan and the fiduciary obligations set forth in the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (hereinafter "ERISA"), and acted arbitrarily, discriminatorily and capriciously. Federal jurisdiction was predicated upon Sections 502(a)(1)(B) and 502(e)(1) of ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and 1132 (e)(1).

On October 14, 1977, Brug filed a motion for summary judgment, and Defendants thereafter filed cross-motions for summary judgment. On November 21, 1977, Local 22's cross-motion for summary judgment was granted and Local 22 was dismissed as a party defendant. On January 19, 1978, the District Court denied Brug's motion for summary judgment. The Trustees' cross-motion for summary judgment was granted and the Trustees were dismissed from the action. After further discovery, Brug renewed her motion for summary judgment. On March 22, 1978, the District Court denied the renewed motion for summary judgment.

Pursuant to leave of court, Brug filed a First Amended Complaint for Declaratory Judgment, Damages and In-

junction on August 27, 1979. In her first amended complaint, which named the Pension Plan as the sole defendant, Brug alleged that the denial of her application for a pension was arbitrary, discriminatory and capricious and in violation of the governing instruments of the Pension Plan and of Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1).[1]

On March 26, 27 and 28, 1980, the case was tried by The Honorable Richard M. Bilby, United States District Judge. On June 9, 1980, the District Court issued an order denying Brug's claims for relief in their entirety. Judgment was entered the same day. In its order, the District Court found that the decision of the Board of Trustees of the CPTF was not arbitrary, capricious, made in bad faith, unsupported by substantial evidence or erroneous on a question of law. Therefore, the District Court held that the decision of the Board of Trustees should not be reversed.

On June 18, 1980, Brug filed a Notice of Appeal.

The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit in December, 1981. On February 12, 1982, the panel issued an opinion reversing the judgment of the District Court. The panel held that the action of the Trustees in denying Brug's pension application was arbitrary and capricious.

A petition for rehearing and a suggestion for a rehearing *en banc* were timely filed. The panel issued an order on April 16, 1982, denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc*.

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[1]Brug also alleged that the Pension Plan was estopped by the representations of an agent of the Carpenters Pension Trust Fund for Northern California from denying Brug's right to a pension. Brug abandoned her equitable estoppel claim prior to the trial of this action.

V

STATEMENT OF FACTS

The Carpenters Pension Trust Fund for Northern California (hereinafter "CPTF") was created in 1958 as the result of collective bargaining negotiations between representatives of certain construction contractor employers and representatives of the United Brotherhood of Carpenters. As part of the collective bargaining agreement executed that year, the signatory participating employers agreed to make contributions to a trust fund on behalf of their employees on the basis of the number of hours worked by individual carpenters and piledrivers in the trade.

The Trustors of the CPTF—that is, the employers and the labor organizations which negotiated the agreement establishing the CPTF (hereinafter "Trust Agreement")—intended the CPTF to provide benefits *only* for carpenters and piledrivers in the trade who were employed by construction contractor employers which made contributions into the CPTF pursuant to the collective bargaining agreements they had signed with the union. The Trustors never intended the CPTF to provide benefits for office clerical employees like Brug. The Recitals in the Trust Agreement as well as the list of parties to the Trust Agreement indicate that this agreement between construction industry contractors and the carpenters union was entered into on behalf of carpenters and piledrivers only.

In 1965, the definitions of "Individual Employer," "Employee" and "Contribution" in the Trust Agreement were amended to include coverage for carpenters and piledrivers who were selected to be representatives or officers of their unions. A prerequisite for such office in the participatory labor organizations is that the official or representative must have been a carpenter or piledriver in the trade. The amendments in question designated the labor

unions involved as employers, and their representatives and officers as employees. These employees were brought under the Pension Plan's coverage so that carpenters and piledrivers who at some point in their working careers became officers and/or representatives of the union would not risk losing their accumulated pension credits while serving in the employ of the union. These 1965 amendments were not intended by the Trustors to include office clerical employees of local unions as people who would receive pensions from the CPTF.

Until 1975, Brug, as a clerical employee in the office of Carpenters Union Local 22, never had any reason to take notice of the existence of the CPTF. That is, she was not employed by a participating construction contractor, nor was she a carpenter in the trade. Brug was an office clerical employee, officially classified as a stenographer in the local union's office. As a member of Office and Professional Employees Union (hereinafter "OPEU"), Local 3, she was subject to the terms of a collective bargaining agreement between that labor organization and her employer, Carpenters Union Local 22. This agreement provided that her employer, Local 22, make contributions on her behalf to the Office and Professional Employees Pension Trust Fund (hereinafter "OPE Pension Trust Fund").

In 1975, the Internal Revenue Service conducted a regularly scheduled audit of the Carpenters Union (as an employer) and the CPTF. The Internal Revenue Service report suggested that a disparity between benefits received by clerical employees of Local 22 from the OPE Pension Trust Fund and benefits received by carpenters employed as officers of Local 22 under the terms of the CPTF might affect the tax exempt status of the CPTF if allowed to continue unremedied.[2]

[2]The Internal Revenue Service later revised its stance and decided that this disparity would not affect the tax exempt status of the CPTF.

As a result of the Internal Revenue Service report, the Trustees of the CPTF erroneously thought that the carpenters employed as officers of Local 22 would have their long-standing pensions under the CPTF negatively affected if the aforesaid disparity was not rectified. Therefore, the Trustees of the CPTF erroneously and unlawfully passed Amendment 13 to the Pension Plan solely for the protection of the carpenter officers of Local 22. This amendment, which was adopted by the Board of Trustees on August 26, 1975, permitted Local 22 to purchase a pension for Mary Brug for the mere payment of approximately $600 to the CPTF in order to secure protection for the carpenter officers.

Sometime in the summer or fall of 1975, Brug learned that she might be eligible for benefits under the CPTF. In the early fall of that year, Brug suffered a nervous breakdown and ceased working for Local 22.

On November 13, 1975, Brug applied for an early retirement pension from the Pension Plan. Michael Pearce of the CPTF did a preliminary analysis of her request and indicated that at that point in time it appeared that she met the requirements of the Pension Plan. On November 17, 1975, however, Pearce notified Brug through Local 22 that she did not, in fact, qualify for the pension for which she had applied. Brug was informed that because she did not have sufficient years of service and was not yet 65 years of age, she did not qualify for the standard pension benefits. Pearce told Brug that she might qualify, however, for a Carpenters disability pension provided she first applied for and qualified for Social Security total disability benefits.[3] Accordingly, on or about November 19,

[3]As found by the District Court, Michael Pearce had no authority to speak on behalf of the Pension Plan regarding the granting or denying of benefits. Only the full Board of Trustees has authority to make such pronouncements. Pearce merely makes recommendations to the Pension Approval Committee, which in turn must forward its recommendations to the full Board for decision.

1975, Brug applied for total disability benefits from the Social Security Administration. The benefits were awarded to her on or about February 10, 1976. This information was relayed to Michael Pearce who informed Brug that her pension application had to be ruled on by the Pension Approval Committee.

During this period of time, Brug applied for and was awarded pension benefits from the OPE Pension Trust Fund under the agreement between her employer, Carpenters Union Local 22, and her union, OPEU, Local 3.

In this interim period between the passage of Amendment 13 and Brug's application for pension benefits, union employers made contributions to the CPTF on behalf of office clerical employees retroactive to June 1, 1975. Following the adoption of Amendment 13, five office clerical employees of various union locals applied for and were granted retirement benefits under the Pension Plan, despite the fact that they were thereby obtaining lifelong pensions of from $255.00 to $600.00 per month supported by contributions from union employers totalling only $800.00 to $1,200.00. The rights of these former clerical employees are not at issue in this suit. They are presently receiving pensions from the CPTF.

Almost immediately after the adoption of Amendment 13, the Trustees of the CPTF began receiving complaints from various individuals regarding the perceived inequity of denying pension benefits to carpenters who had worked in the industry for a number of years, while affording them to office clerical employees who had been covered for only a matter of months. These complaints and criticisms continued throughout the period subsequent to the passage of Amendment 13, and the Pension Plan was

actually threatened with a class action lawsuit based on this amendment. Therefore, the Trustees almost immediately began considering modifying or, alternatively, rescinding Amendment 13. Their consideration of the matter culminated in the events of March, 1976.

On March 16, 1976, the regularly scheduled meeting of the Pension Approval Committee took place. At this meeting, the Committee considered a number of pension applications before it on the agenda. The members of the Committee knew at the time of this meeting that a major policy decision was facing the Board of Trustees, the only body constituted to rule on policy matters for the Pension Plan: the question of whether Amendment 13's provision for eligibility for clerical employees should be continued. Accordingly, the Pension Approval Committee deferred making a recommendation upon the application of Brug until that policy decision had been made.

The full Board of Trustees met to consider the matter on March 23, 1976. Prior to that occasion, the Trustees were advised by counsel that the provisions of Amendment 13 were unlawful. Accordingly, the Trustees voted not to accept any further contributions on behalf of clerical employees, to refund contributions that had been thitherto made, and to advise contributing union employers that clerical employees could not be covered under the Pension Plan. Pursuant, however, to advice of counsel that the Pension Plan was estopped from challenging the pensions of the office clerical employees who had already been granted benefits, the Trustees voted not to attempt to rescind those benefits. Immediately after this meeting of the full Board of Trustees, the Pension Approval Committee reconvened. Because the Board of Trustees had voted to rescind Amendment 13, the Pension Approval Committee voted to deny Brug's pension application.

On March 29, 1976, Brug received notification of the Pension Approval Committee's action. She was informed that the Trustees were reconsidering whether or not clerical employees were to be included in the Pension Plan's coverage. Thereafter, in May, 1976, the Trustees took the formal step of rescinding Amendment 13. All contributions which had been made by Brug's employer on her behalf were thereafter refunded by the CPTF.

VI

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Decision of the Court of Appeals Is in Conflict with Both This Court's Decision in Arroyo v. United States, 359 U.S. 419 (1959), and the Decision of a State Court of Last Resort Concerning the Limitations Imposed by Section 302(c)(5) of the Labor Management Relations Act of 1947 Upon the Discretion of Trustees of Jointly Administered Pension Trust Funds

The CPTF is a jointly administered pension trust fund established under the authority of Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* (hereinafter "LMRA")[4]. This Court has stated in no uncertain terms that the trustees of a Section 302(c)(5) jointly administered pension trust fund may not expend the assets of such a fund for purposes other than those for which the fund was established. *Arroyo v. United States*, 359 U.S. 419, 426 (1959). That is, the trustees have no power or authority to alter, change or modify a trust instrument by unilateral act, without the concurrence of the trustors—the signatory labor unions and employer associations. *French v. Construction Laborers Pension Trust*

[4]A verbatim text of Section 302(c)(5), 29 U.S.C. § 186(c)(5), is attached to this Petition at Appendix D.

For Southern California, 44 Cal.App.3d 479, 489 (1975). *See also Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969). In *Arroyo*, this Court explicitly set forth the limits of the powers of such trustees:

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." 359 U.S. at 426.

This principle was closely followed in a well-reasoned opinion in a case similar to the instant one. A California Appellate Court,[8] applying federal labor law pursuant to its concurrent jurisdiction over such matters, held that trustees of a Section 302(c)(5) jointly administered pension trust fund may not go beyond the bounds of the original trust agreement created by the collective bargaining parties, or trustors. *French v. Construction Laborers Pension Trust Fund For Southern California*, 44 Cal.App.3d 479 (1975). In the *French* case, plaintiffs had contributed into the defendant pension trust fund for several years, retired, applied for pensions, and in fact received pension benefits. Then the defendant pension trust fund discovered that although contributions had been made on the plaintiffs' behalf by their employer, they had not been working for an

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[8]Since both a petition for a rehearing and a petition for a hearing by the California Supreme Court were denied (*French*, 44 Cal.App. 3d at 493), the California Appellate Court in *French* is "a state court of last resort."

employer who had signed the collective bargaining agreement calling for such payments to be made. The defendant pension trust fund therefore ceased making pension benefit payments to the plaintiffs and demanded that the plaintiffs return all payments which they had previously received. The court pointed out that the trust agreement indicated that only employers who were signatory to a certain collective bargaining agreement could make contributions on behalf of their employees and that only such "covered" employees could be granted pensions. Since the employer of the plaintiffs had not signed the appropriate collective bargaining agreement at the appropriate time, granting pensions to these employees went beyond the terms of the trust agreement and the trustees would . e been acting beyond their authority as set forth in the trust agreement if they had continued to make pension payments to the plaintiffs. As a result, the court decided the case in favor of the defendant pension trust fund. The court stated:

> "The Trustees of such a trust had no power or authority to alter, change, or modify such trust instrument by unilateral act without the concurrence of the Trustors—the signatory labor unions and employer associations. If the Trustees were guilty of wrongdoing in their dealings with third persons (M & M) (we do not conclude that they were) which resulted in damage to such third persons, the Trustees may or may not have personal liability to such third person but the Trustees may not effect what amounts to an amendment of the trust agreement relating to qualifications for membership by unilateral act even though it may be characterized as a waiver or estoppel. In *Moglia v. Geoghegan* (S.D. N.Y. 1967) 267 F.Supp. 641, affd. (2d Cir. 1968) 403 F.2d 110, the Trustees of a pension trust established under the Taft-Hartley Act refused a pension to a widow of an alleged 'em-

ployee' whose employer had failed to make contributions to the trust. Under the trust definition of employees the widow's husband was not an employee. The widow argued that the trust and law should be interpreted to protect 'employees.' The court pointed out that the trustee owed duties to the beneficiaries of the trust and that it could not jeopardize their rights by, in effect, changing the terms of the trust to include people not eligible, that even if the employer had made contributions on behalf of the husband and the trustees acting in a grossly negligent manner had accepted them, that such conduct could not change the trust instrument and extend coverage to people not covered." *French*, 44 Cal.App.3d at 489.

In this respect, Section 302(c)(5) jointly administered trust funds are just like any other trusts. That is, the trust*ors* set forth the terms of the trust and their intentions in a formal trust agreement, which serves as the trust document pursuant to which the trust*ees*, who are appointed to manage the trust, will administer the trust. That trust agreement is a document created by the trust*ors* which may be amended, modified or changed only by the trust*ors* or their successors. The pension plan, on the other hand, is a set of rules and regulations which the trust*ees* pass, pursuant to the powers granted to them by the trust*ors* in the trust agreement. Thus, the trust agreement is the governing document since it is signed by the trust*ors*, while the pension plan is a set of subordinate rules and regulations which are drafted by the trust*ees*, who must at all times act only within the scope of authority given to them by the trust*ors* in the trust agreement.[6]

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[6]This distinction is absolutely crucial since Plaintiff Brug seems to base her entire claim on the Pension Plan, a set of rules and regulations drafted by the Trustees, without realizing that the

Applying these principles of law to the case at hand is a simple and straightforward matter, despite the complexity of the facts. As discussed *supra*, the Trust Agreement did not and does not allow the Trustees to grant pensions to office clerical employees who are members of OPEU Local 3 and have never been carpenters or piledrivers. Prior to 1965, there would have been no confusion whatsoever concerning this matter. The confusion introduced in this case is a result of the 1965 amendments to the Trust Agreement. However, it was never the intent or express declaration of the Trust*ors* to include anyone other than carpenters and piledrivers. The 1965 amendments to the Trust Agreement were intended to include only employees of the union locals and district councils who had been in and might return to the trade of carpenter or piledriver. These amendments were passed in order to insure that carpenters and piledrivers, who were elected to positions in their unions and temporarily moved out of employment for participating construction contractors and into employment for the union, would not incur a "break-in-service" which would adversely affect their pension eligibility.

Because the Internal Revenue Service audit suggested that the CPTF might have tax-related problems as a result of the disparity between the size of the OPE pension and the Carpenters pension, the Trustees passed Amendment 13 to the Pension Plan based on the assumption that the 1965 amendments to the Trust Agreement gave them sufficient authority. However, prior to granting a pension to Brug, the Trustees reconsidered this matter and were ad-

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document which truly governs the CPTF is the Trust Agreement itself, since it is the document drafted and agreed to by the Trust*ors*. The Trust Agreement sets forth the powers, duties and authorities of the Trustees, while the Pension Plan is simply a set of rules and regulations setting forth the terms under which various benefits are to be paid.

vised by their counsel and their consultants that Amendment 13, if perpetuated, would give a group of people, who were not "covered" employees within the meaning of the Trust Agreement and were not within the collective bargaining unit of the agreement giving rise to the CPTF, a lifetime pension for the price of approximately $600, while thousands of carpenters had been denied pensions because they missed, for example, 1/12 of a credit needed for vesting after having contributions made on their behalf for almost 10 years. The counsel and consultants emphasized that the Trust Agreement was not intended to give the Trustees authority to award pensions to office clerical employees who had never been and never would be carpenters or piledrivers. Informed of the original intent of the Trust*ors*, the Trustees of the CPTF rescinded Amendment 13 and, only then, denied Brug's application for a pension.

Thus, the Trustees went beyond the scope of their authority as set forth in the Trust Agreement only when they adopted Amendment 13 to the Pension Plan, which stated that office clerical employees would be "covered." However, in March, 1976, when they were informed by counsel and consultants that the real intent of the Trust*ors* was to cover only carpenters and piledrivers, even when they were temporarily employed by their unions, the Trustees rescinded Amendment 13 so that they would be acting within the scope of their authority as set forth by the Trust*ors*. Moreover, the Trust Agreement limited the power of the Trustees so that they did not even have the legal authority to grant a pension to Brug, since she was not meant to be included as a potential participant by the Trust*ors*.

The only act of the Trustees which arguably might have been incorrect was to pass Amendment 13 in the first place. However, as soon as they realized the error they had made, they acted as reasonably, carefully and

in good faith as possible, by rescinding Amendment 13 and refusing to give it any effect. The Trustees were thus acting within the scope of their authority as set forth by the Trustors in the Trust Agreement.

Plaintiff Brug cannot invoke the doctrine of estoppel to compel the Trustees to award her pension benefits. The Ninth Circuit has held that the federal law of estoppel may not be applied to compel a Section 302(c)(5) pension trust fund to pay benefits to someone determined to be ineligible under the provisions of the trust agreement. *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976); *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1266-67 (9th Cir. 1979).

In addition, the Trustees herein would act contrary to the fiduciary standard set forth in ERISA if they were to grant a pension to Brug. Section 404(a)(1) of ERISA provides, in part, that:

> "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter. . . ."
>
> 29 U.S.C. § 1104(a)(1).

Thus, ERISA also requires trustees to act in accordance with the trust documents in carrying out their fiduciary obligations. The Trustees herein have a fiduciary relationship to all the carpenters and piledrivers for whom contributions have been made into the CPTF. If the Trustees were to grant a pension to an office clerical employee like Brug, any potential participant in the CPTF or any participant now receiving a pension could sue the Trustees on the ground that they had breached their fiduciary duty

to act solely in the interest of the participants and beneficiaries and "in accordance with the documents and instruments governing the plan". In other words, it would be a breach of fiduciary duty to the carpenters and piledrivers to grant a pension to Brug.

Consequently, the decision of the Court of Appeals that the Trustees' denial of Brug's pension application was unlawful is in conflict with both this Court's decision in *Arroyo* and the decision of the California Appellate Court in *French*. We submit that the granting of the pension to Brug under the circumstances of this case is tantamount to the spending of trust assets without proper authority. To continue to require this action on the part of the Trustees is, in effect, a direct violation of the provisions of the Trust Agreement, Section 404(a)(1) of ERISA and Section 302(c)(5) of the LMRA, which cannot be allowed to stand.

B. The Decision of the Court of Appeals Is in Conflict With Established Case Law in the Eighth, Tenth and District of Columbia Circuits, and with Prior Case Law in the Ninth Circuit Concerning the Trustees' Discretion to Choose Between Two Reasonable Alternatives

Even assuming *arguendo* that the language of the Trust Agreement is not unambiguous with regard to coverage of a local union's clerical employees and that Brug's interpretation of the Trust Agreement is reasonable, the Trustees' decision denying Brug's pension application must nevertheless be upheld since the Trustees' interpretation of the Trust Agreement (i.e., that it does not cover a local union's clerical employees) is also reasonable. *Lowenstern v. International Association of Machinists and Aerospace Workers*, 479 F.2d 1211, 1213 (D.C. Cir. 1973); *Roark v. Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968); *Miniard v. Lewis*,

387 F.2d 864, 865 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968); *Tomlin v. Board of Trustees of the Construction Laborers Pension Trust for Southern California*, 586 F.2d 148, 151 (9th Cir. 1978); *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1265 (9th Cir. 1979); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981); *Morgan v. Mullins*, 643 F.2d 1320, 1323 (8th Cir. 1981); *Mestas v. Huge*, 585 F.2d 450, 453-54 (10th Cir. 1978). These cases make clear that it is for the Trustees, not the courts, to choose between two reasonable alternatives.

While the Trust Agreement may be susceptible to the interpretation which Brug urges (i.e., that it covers a local union's clerical employees), it is at least equally susceptible to the Trustees' interpretation (i.e., that it does not cover such employees). Since the Trustees' interpretation is a reasonable one, its application in this case was not arbitrary or capricious, and should be upheld by this Court.

C. The Decision of the Court of Appeals Is in Conflict with This Court's Decision in United Mine Workers of America Health and Retirement Funds v. Robinson, 102 S.Ct. 1226 (1982)

United Mine Workers of America Health and Retirement Funds v. Robinson, 102 S.Ct. 1226 (1982), concerned the scope of federal court review of a collective bargaining agreement which discriminated between two classes of widows of coal miners who died prior to the effective date of the agreement—those whose husbands were receiving pensions when they died and those whose husbands were still working at the time of death even though they were eligible for pensions. The collective bargaining agreement increased the health benefits, payable out of a trust fund financed by contributions from the coal operators, for widows in the former class but made no increase for those

in the latter class. Widows in the latter class brought a class action in federal district court against the trustees of the fund, alleging that the requirement that a miner actually be receiving a pension at the time of his death in order to make his widow eligible for the increased health benefits had no rational relationship to the purposes of the trust fund and therefore was illegal under Section 302 of the LMRA. This Court held that Section 302(c)(5) of the LMRA does not authorize federal courts to review for reasonableness the provisions of a collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund. This Court reasoned as follows:

> . . . There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective bargaining agreements because the union need not 'affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.' *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n 20 . . . Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective bargaining agreement." (Footnote omitted.) *Robinson*, 102 S.Ct. at 1233-34.

Robinson makes clear that a negotiated agreement, such as the Trust Agreement in the instant case, can permissibly discriminate in favor of bargaining unit employees, and that, under Section 302(c)(5) of the LMRA, a court cannot second guess the trustees with regard to their enforcement of such a trust agreement. Here the Ninth Circuit acted contrary to the teachings of *Robinson*[1] by second guessing the Trustees' attempt to correct an erroneous interpretation of the Trust Agreement.

The principal purpose of the CPTF, as a collectively-bargained pension trust fund established under the authority of Section 302(c)(5) of the LMRA, is to serve the bargaining unit employees, who are its principal beneficiaries and for whose benefit it was originally created. By rescinding Amendment 13 to the Pension Plan, the Trustees sought to correct an erroneous interpretation of the Trust Agreement, which if left uncorrected would result in the deviation of trust assets from the CPTF's purpose. By correcting this mistake, the Trustees sought to protect the principal beneficiaries of the CPTF—carpenters and piledrivers in the trade. *Robinson* indicates that setting up priorities among potential beneficiaries is not per se discriminatory, and that the trustees have a great deal of discretion in balancing the interests in that regard. Here the Trustees properly used their discretion to correct an erroneous interpretation of the Trust Agreement and thereby preserve the assets of the CPTF against claims by Brug and other persons under similar circumstances. Through this action, the Trustees reaffirmed the priorities which had originally been established by the collective bargaining parties. To require the CPTF to pay for that mistake by awarding pension benefits to Brug is totally inconsistent

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[1]Petitioner recognizes that the decision of the Court of Appeals in the instant case antedates this Court's decision in *Robinson*.

with the purposes of the CPTF and contrary to this Court's decision in *Robinson*.

D. The Decision of the Court of Appeals Is in Conflict with the District of Columbia Circuit's En Banc Decision in Pete v. United Mine Workers of America Welfare and Retirement Fund of 1950, 517 F.2d 1275 (D.C. Cir. 1975), Concerning the Inequity of Awarding a Pension to a Person Without Substantial Contributory Employment

At the time of its decision, *Pete v. United Mine Workers of America Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975), was the latest in a series of cases challenging the validity of the "signatory last employment" provision limiting eligibility for the flat retirement pension provided by the United Mine Workers of America Welfare and Retirement Fund of 1950. Plaintiff classes consisted of miners whose applications for retirement benefits were denied. The Pete class consisted of coal miners who had retired prior to February 1, 1965, and whose applications had been denied because they had not ceased work in the coal industry immediately following some period of employment by a mine operator signatory to the National Bituminous Coal Wage Agreement. The Kiser class consisted of coal miners who had retired between February 1, 1965, and August 14, 1970, and whose applications had been denied because they had not ceased work in the coal industry immediately following one year of employment by a signatory operator. Prior to the *en banc* decision in *Pete*, the trustees of the fund adopted a five year contributory service provision to replace the "signatory last employment" requirement, and all members of the Pete and Kiser classes who had more than five years of contributory employment were enrolled as pensioners. As a result, the *Pete* court focused on the claims of the members who had less

than five years of contributory employment and addressed the issue of "the period of signatory service needed to qualify for a pension." *Id.* at 1279.

In an earlier appeal, a panel of the District of Columbia Circuit, in holding the "signatory last employment" requirement to be invalid, had emphasized that "the Trustees have failed to explain why it is reasonable to award a pension to a man who has worked only one year in contributory employment and to deny one to a man who has worked 19 out of his 20 years in the coal industry in contributory employment." *Roark v. Boyle,* 439 F.2d 497, 503 (D.C. Cir. 1970) (*Roark II*). The *Roark II* panel pointed out that Section 302(c)(5) of the LMRA[8] "requires that each pensioner have some history of contributory employment." *Id.* at 501. The *Roark II* panel ruled that "the spirit of the Taft-Hartley proviso [Section 302(c)(5) of the LMRA]" would be served "by gearing eligibility for a full pension to a condition of substantial contributory employment." *Id.* at 503; *Pete,* 517 F.2d at 1284. However the *Roark II* panel failed to define specifically what minimum amount of signatory employment Section 302(c)(5) required.

In its *en banc* decision in *Pete,* the District of Columbia Circuit determined that a five year signatory service requirement implements the analysis of *Roark II* and furthers the purposes of the fund,[9] and that the trustees' refusal to grant pensions to miners with less than five years

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[8]The provision of Section 302 of the LMRA authorizing employers to contribute to trust funds requires that such funds be "for the sole and exclusive benefit of the employees of such employer, and their families and dependents." Section 302(c)(5), 29 U.S.C. § 186(c)(5).

[9]The court emphasized that the element of "substantial" contributory service was identified in *Roark II* as the "contemplation and spirit" of Section 302(c)(5) of the LMRA. *Pete,* 517 F.2d at 1287.

of signatory service cannot be deemed arbitrary or capricious. The court's reasoning, which has direct bearing on the instant case, was as follows:

> ". . . As of the date of *Roark II*, this court was aware that the overwhelming bulk of eligibles, under the last year's signatory service provision, had total signatory service that was substantial (five years or more). What the court was concerned with was the possible discriminatory unfairness, in the Fund's maturing years, of denying applications of other persons with substantial signatory service, when there was even a minimum possibility of eligibility, through last year's signatory service, on total signatory service that was not substantial. It suggested that the issue of discriminatory unfairness be removed by conditioning eligibility on substantial signatory service.
>
> *Roark II* can give no comfort to any miner without substantial signatory service. The only equity that was recognized was that of persons having substantial signatory service. The court stressed the need for substantial signatory service—either by recognizing that last year's signatory service, though generally the functional equivalent of substantial signatory service, be conjoined with an explicit requirement of substantial signatory service or by permitting a sole criterion of substantial (at least five years) signatory service. *Roark II* ruled that the 'last year' provision could not validly be the exclusive means of defining substantial signatory service, but it certainly did not countenance that the concept of substantial signatory service be scrapped altogether. And the only awards made by *Roark II* and its progeny provided pension benefits to plaintiffs with between eight and sixteen years of signatory service.

> We need not tarry with the possibility that *Roark II* left a residual question arising out of a few payments having been made, on the basis of last year's signatory service, to persons without substantial signatory service. If it is premised that such payments were improper, the remedy if any would lie against the Trustees subject to whatever defenses are available to a fiduciary. Equity does not take account of mistakes by requiring their escalation. The same result is reached if it is premised, on the other hand, that any past payments on the basis of the last signatory criterion are sustainable, even in the absence of substantial signatory service, on the theory that the miner met all then-existing criteria, prior to our *Roark* decisions, and is entitled to payment under *Danti v. Lewis* [, 312 F.2d 345, 349 (D.C. Cir. 1962) (holding that a miner who met all existing criteria could not be denied a pension on the basis of requirements adopted by the Trustees after the date of his application).] Plaintiffs could not proceed on that analysis. In considering plaintiffs' plea for a reconstitution of eligibility requirements by a court of equity, the latitude of an equity court is subject to the purpose of its authority, to safeguard against arbitrary or capricious actions of the Trustees which threaten to frustrate rather than fulfill the purposes of the Fund, and we would not have latitude as an equity court to dispense with the criterion of substantial signatory service (at least five years) that has been both projected in *Roark II* and accepted by the Trustees." *Pete*, 517 F.2d at 1285-86.

The *Pete* court recognized that there may be miners with less than substantial contributory service "who are now in need, but for a court to ignore the Trustees' proposal and bestow a lifetime pension for any year's contributory

service would confuse pensions with welfare, and interject . . . an unprecedented 'judicial imposition of private philanthropy.'" *Id.* at 1287.

Pete makes clear that the refusal by trustees to grant lifetime pensions to those employees who have only a few months of covered employment is not arbitrary or capricious. In the instant case, the Ninth Circuit has ignored this lesson of *Pete*. The Ninth Circuit asserts that the Trustees had the discretionary authority under the terms of the Trust Agreement both to include the clerical employees and to terminate the clerical employees' inclusion in the Pension Plan. *Brug*, 669 F.2d at 575. But the Ninth Circuit virtually fails to address two important issues: (1) whether the Trustees had the discretionary authority to grant pensions to clerical employees with only a few months of covered employment, and (2) whether it was arbitrary and capricious for the Trustees to deny pensions to clerical employees with only a few months of covered employment, especially when their inclusion in the Pension Plan was based on an erroneous interpretation of the Trust Agreement. With regard to these important issues, the Ninth Circuit merely states that the "Pension Plan provided for pension credit for service before the designated contribution date for other employees as well." *Id.* Even assuming *arguendo* that such credit is provided, the crucial concern addressed in *Pete* was the extent of the covered employment. In that regard, *Roark II* and *Pete* both emphasized that Section 302(c)(5) requires that each pensioner have substantial contributory employment. Plaintiff Brug simply does not meet that requirement. As a result, the Trustees' refusal to grant her a lifetime pension was not arbitrary or capricious.

The Trustees' refusal to grant Brug's application for a pension is responsive to the court's concern in *Roark II*

over the discriminatory unfairness of denying applications of other persons with substantial contributory employment, when even a small number of people are eligible for pensions based on a minimal amount of contributory employment. In the instant case, numerous carpenters have been denied pension coverage despite employment by signatory employers who had made substantial contributions on their behalf for a number of years. That office clerical employees, who had other pension resources under collective bargaining agreements between their union employers and their union representative (the OPEU), were receiving substantial lifetime pension benefits supported by only meager contributions to the CPTF over a period of a few months is a clear example of the discriminatory unfairness condemned in *Roark II*.[10]

Thus, the Trustees' denial of Brug's pension application is consistent with the teachings of *Roark II* and *Pete*, and should be upheld by this Court.

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[10]The analysis in *Roark II* and *Pete* is consistent with the fiduciary standard set forth in ERISA. Section 404(a)(1) of ERISA provides, in part, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . ." 29 U.S.C. § 1104(a)(1).

CONCLUSION

The decision of the Court of Appeals seems like an appealing one because the CPTF has a deep pocket. In fact, however, that decision, if permitted to stand, perpetuates a gross discriminatory act in total violation of ERISA and Section 302 of the LMRA. Under that decision, Plaintiff Brug will get two full pensions, one as a beneficiary under an office employees contract with her employer and the other under the CPTF. The latter is supported by contributions taken from the wage package of carpenters and solely paid for by them. Brug never paid for the pension from the CPTF out of her own wage package. And no carpenter has ever been permitted to purchase a lifetime pension for approximately $600 (the equivalent of less than three months of pension payments to Brug by the CPTF). In other words, the action of the Court of Appeals permits Brug to receive a lifetime pension of $255 a month for the mere payment of roughly $600 total by her employer under Amendment 13. Everyone in the world would like a pension of $255 a month financed by a pension contribution of approximately $600. That is so totally actuarially unsound and wrong that it does not require further comment. And that is why the Trustees were told that their action was illegal and that they did not have the authority to amend the Trust Agreement which could only be amended by the collective bargaining parties.

This act is patently discriminatory against all carpenters who are required to contribute thousands of dollars during their working lives to qualify for a pension while Brug is permitted to get hers for only a $600 contribution. This is so discriminatory that it absolutely screams for this Court, its busy schedule notwithstanding, to reverse the Ninth Circuit's decision.

Finally, it should be noted that Brug was not lulled into some false sense of security by the conduct of the CPTF. Brug applied for a disability pension. Either she had a disability or she did not. Thus, her retirement was motivated by physical disability and not by any conduct of the CPTF.

The only argument that Brug could offer would be based on the doctrine of estoppel. However, the Ninth Circuit has ruled that Section 302 of the LMRA prohibits the payment of a pension on an estoppel theory to someone determined to be ineligible under the provisions of the trust agreement. *Thurber v. Western Conference of Teamsters Pension Plan,* 542 F.2d 1106, 1109 (9th Cir. 1976); *Aitken v. IP & GCU-Employer Retirement Fund,* 604 F.2d 1261, 1266-67 (9th Cir. 1979).

If the decision below is permitted to stand, trustees will be able to make all kinds of sweet little deals for special people and special employers while the ordinary people and the ordinary workers will continue to have to slug it out to earn their pensions.

For the reasons suggested above, the Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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